In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-431

VITA FOOD PRODUCTS OF ILLINOIS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-26 to A-45) is reported at 502 F.2d 715. The opinion of the district court (Pet. App. A-11 to A-25) is reported at 356 F. Supp. 1213.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1974. The petition for a writ of certiorari was filed on October 16, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the chemicals DDT and dieldrin, when found in processed fish sold in interstate commerce, are food additives under Section 201(s) of the Federal Food, Drug, and Cosmetic Act.

STATUTE INVOLVED

The relevant provisions of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended, 21 U.S.C. 301, *et seq.*, are set out in the petition for a writ of certiorari (Pet. 2-5).

STATEMENT

In September 1970 the United States commenced a proceeding in the United States District Court for the Northern District of Illinois, under Section 302(a) of the Federal Food, Drug, and Cosmetic Act (the "Act"), 21 U.S.C. 332(a), against Vita Food Products of Illinois, Inc. (petitioner) and its vice-president, Lawrence Schweig, to enjoin the defendants from introducing adulterated food into interstate commerce in violation of Sections 301(a) and 301(k) of the Act (21 U.S.C. 331(a), 331(k)). The complaint alleged that petitioner violates Sections 301(a) and 301(k) of the Act by shipping in interstate commerce, and processing after shipment in interstate commerce, smoked chubs that are adulterated within the meaning of Section 402(a)(2)(C) of the statute, since the chubs contain excessive residues of the unsafe food additives DDT and dieldrin. The Food and Drug Administration (FDA) has established enforcement guidelines regarding the safe limits of these chemicals in fish for human consumption.[1]

---

[1]Under Section 402(a)(2)(C) of the Act food is deemed adulterated if it contains a substance that is a food additive within the meaning of Section 201(s), unless there is an effective regulation or exemption issued pursuant to Section 409 permitting its presence in food. There is neither any regulation nor exemption under Section 409 permitting *any* amount of DDT or dieldrin in smoked fish. FDA established 5 parts per million (ppm) for DDT and 0.3 ppm for dieldrin as the levels of these chemicals in fish above which it would take enforcement action. These enforcement guidelines were held proper by the court of appeals (Pet. App. A-41 to A-43). See *United States* v. *Goodman*, 486 F.2d 847, 855 (C.A. 7).

The complaint sought to enjoin only the shipment of chubs with residues in excess of the guidelines. Other chubs (and other fish) without excessive concentrations still may be shipped.

The district court held that the DDT and dieldrin found in Vita's smoked chubs are not "food additives" within Section 201(s) of the Act.[2] Citing the legislative history, the district court concluded that "accidental additives" were not food additives, and held that if "DDT and dieldrin traces found in fish are to be considered 'additives' in any sense, they must clearly be considered 'accidental' ones and as such not a 'food additive' under the Act" (Pet. App. A-18).

The court of appeals reversed. It held that the DDT and dieldrin in Vita's processed chubs are "food additives" within the meaning of Section 201(s) because the statutory definition of food additive "as *any* substance, 'the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food' " is not confined to substances used in food processing (Pet. App. A-36). The food additive need not be added by the food processor itself; it can be introduced from any source, including pre-processing sources. Moreover, the court noted that unprocessed chubs containing dieldrin or DDT would be deemed adulterated as raw agricultural products containing pesticide chemicals, and concluded that acceptance of petitioner's contention "would result in the anomaly that a chemical such as DDT would adulterate all raw fish, but adulteration of processed fish would be determined on an uncertain case-by-case basis" (Pet. App. A-37).

---

[2]The district court also held that the test methods employed by the government are not reliable enough to determine whether Vita's fish contained DDT concentrations in excess of 5 ppm (Pet. App. A-23 to A-24). The court of appeals reversed this conclusion, but petitioner does not contest that portion of the court of appeals' decision.

The court of appeals also concluded that the government's tests, although of uncertain accuracy, use the best reasonably available methodology and therefore are adequate to evaluate Vita's compliance with the DDT guidelines (Pet. App. A-44). It accordingly held that the DDT and dieldrin in petitioner's chubs adulterate the fish within the meaning of the Act.

ARGUMENT

The court of appeals correctly interpreted the relevant statutory provisions. There is no conflict in the courts of appeals.[3] Other courts therefore ought to be permitted to consider the issues before this Court undertakes to resolve them.

1. This Court has long recognized that the Act contains its own glossary of terms and that these definitions are controlling. *McDermott* v. *Wisconsin*, 228 U.S. 115, 129; *United States* v. *Coca Cola Co.*, 241 U.S. 265, 277; *62 Cases of Jam* v. *United States*, 340 U.S. 593, 596. "Food additive" is defined in Section 201(s) as

> any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food * * *; except that such term does not include—
>
> (1) a pesticide chemical in or on a raw agricultural commodity;* * *

---

[3]Four courts have passed on the question: two district courts (*United States* v. *Ewig Brothers Fish Corporation, Inc.*, No. 71-C-158 (E.D. Wis. 1972); *United States* v. *City Smoked Fish Co.*, Civ. No. 33989 (E.D. Mich. 1970)), and the court of appeals here (which also affirmed *Ewig*), have held that DDT found in smoked fish is a "food additive" within the meaning of the Act. The only contrary decision is that of the district court in this case.

Aside from the exceptions for pesticides in raw agricultural commodities and certain other substances, which we discuss below, Section 201(s) in unmistakable terms provides that when a substance becomes a component of any food it is excluded from the definition of "food additive" only if its becoming a component did not result from the substance's "intended use." See S. Rep. No. 2422, 85th Cong., 2d Sess. 5.

That DDT and dieldrin become components of petitioner's chubs as a result of the intended use of these chemicals is clear. DDT and dieldrin were to be used as pesticides and, when used as such, residues remain after the primary purpose of the application has been achieved. These residues are unavoidable and are in no sense unintended or unintentional. So, too, is the subsequent movement of these residues into Lake Michigan. It is unavoidable that the residues, once created, will come to rest in the bodies of waters that drain the river basins into which the pesticides originally were sprayed. From there, their eventual ingestion by chubs, either directly or because the chubs feed on material containing residues, again is inevitable.[4] Throughout this chain there is no accident, no improbable happenstance. The ultimate event—DDT and dieldrin in petitioner's chubs—is an inevitable consequence of an intended human act, the use of pesticides. Therefore the definition of Section 201(s) is met: the "intended use" of DDT and dieldrin as pesticides "may reasonably be expected to result * * * indirectly, in its becoming a component * * * of" petitioner's chubs. Since no regulations have been issued either finding that these chemicals are generally recognized as safe, or setting tolerance levels for them, they are present in petitioner's chubs as

---

[4]Testimony of Dr. Frederick Coulston (Tr. 53-54). Indeed, petitioner's president testified that Vita and the fish industry in general have, since mid-1969, recognized the problem caused by the DDT residues in their smoked fish (Tr. 1084-1085, 1099-1100).

unsafe food additives within the meaning of Section 409(a),[5] and consequently the food is adulterated within the meaning of Section 402(a).[6]

2. The thrust of petitioner's argument is that, because petitioner did not add the chemicals to its chubs, they are not food additives (*e.g.*, Pet. 20-22). But Section 201(s) does not require that a food additive be added only by the processor of the food. The focus of the statutory program is on the end product, not on the procedures used to produce that end product. Section 201(s) does not say that someone must have intended to add the substance to the food; it says instead that a substance is a food additive when it becomes a component of the food as a result of its intended use. It would be anomalous that a prohibition of the inclusion in food of an unsafe substance should turn on which party in the food distribution chain added the substance.

a. Petitioner contends that the DDT and dieldrin in its chubs are not "additives" because the substances were present in the fish before they were caught and were added neither by the fishermen nor by the processor. Petitioner asserts (Pet. 22) that this case is comparable to *United States* v. *1232 Cases American Beauty Brand Oysters*, 43 F. Supp. 749 (W.D. Mo.), which held that oyster shells in oysters are not an "added substance" for purposes of Sections 402(a)(1) or 402(a)(2) because "the deleterious substance inheres in the product and is not added." *Id.* at 751.

---

[5]Under Section 409(a) all food additives are "deemed to be unsafe" for the purposes of Section 402(a) unless "there is in effect * * * a regulation * * * prescribing the conditions under which [the] additive may be safely used." There is no such regulation applicable to the DDT and dieldrin in petitioner's chubs.

[6]Section 402(a)(2)(C) provides that a food is "adulterated" if it contains an unsafe food additive.

DDT and dieldrin do not "inhere" in chubs in the same sense that shells inhere in oysters. The presence of a shell on an oyster is not the result of any human activity. The presence of DDT and dieldrin in Lake Michigan chubs *is* the result of the use of those products in human endeavors. Such chemicals are not natural components of fish and, therefore, petitioner cannot rely upon the language of Section 402(a)(1), which provides that if a poisonous or deleterious substance found in food "is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health."

b. Petitioner also asserts that the DDT and dieldrin in its chubs are "pesticide chemicals" and therefore cannot be "food additives" (Pet. 29). But the definition of "food additive" in Section 201(s) excludes only pesticide chemicals "in or on a raw agricultural commodity". Although fish are doubtless raw agricultural commodities[7] when caught (and the chubs involved here are therefore unsaleable because adulterated (Pet. App. A-37)), petitioner's *processed* chubs are not in that category, and the chemicals in them therefore cannot qualify under the exception in Section 201(s)(1).[8] See *Environmental Defense Fund, Inc.* v. *Department of Health, Education, and Welfare*, 428 F.2d 1083 (C.A.D.C.); *United States* v. *Bodine Produce Co.*, 206 F. Supp.

---

[7]Section 201(r) defines the phrase as "any food in its raw or natural state * * *."

[8]Moreover, the list of exceptions to Section 201(s) was enacted at the same time as a proviso to Section 402(a)(2). The proviso permits distribution of processed food containing pesticide residues not permitted by a Section 409 tolerance regulation for food additives, *if* the processed food complies with a tolerance regulation issued under Section 408 for pesticide residues. This proviso would be superfluous if Congress intended that substances once pesticide residues could never become food additives in processed food.

201 (D. Ariz.). Thus, when petitioner's chubs are offered for sale to consumers, they contain food additives.

c. Finally, petitioner contends that, to the extent its fish contain an additive, the additive is "accidental" rather than "incidental." The Senate Report does state that accidental additives[9] are not food additives. S. Rep. No. 2422, 85th Cong., 2d Sess. 5. However, the Report also explains that accidental additives are substances that "if properly used may not reasonably be expected to become a component of a food or otherwise to affect the characteristics of a food." *Ibid.* By contrast DDT, when properly used, *can* reasonably be expected to become a component of petitioner's chubs.[10]

The presence of DDT and dieldrin in petitioner's chubs is not accidental. It is instead an inevitable consequence of a desired and intended use as pesticides. The presence of residues is therefore properly addressable by tolerance levels set by a food additive regu-

---

[9]Accidental additives are themselves governed by Sections 402(a)(1) and 406.

[10]Therefore, under the "incidental-accidental" dichotomy, the DDT cannot properly be considered "accidental" within the meaning of the Senate Report. As Dr. Robert Blackwell Smith, Jr., President of the Medical College of Virginia, testified during the hearings on the Food Additives Amendment (Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, on Food Additives, Bills to Amend the Federal Food, Drug, and Cosmetic Act with Respect to Chemical Additives in Food, 85th Cong., 2d Sess. 83, 89):

> The incidental food additive is a substance which appears in the final product as it is received by the consumer, not intentionally, but incidental to its use somewhere back along the line of food production, *such as a pesticide which is necessary in order to produce a food crop*. [Emphasis added.]

lation or by enforcement guidelines. And because petitioner's chubs exceeded the levels set by the enforcement guidelines for DDT and dieldrin, the presence of those food additives in petitioner's chubs adulterated them. The court of appeals correctly concluded that petitioner could be enjoined from distributing fish with residues in excess of the enforcement guidelines.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

CARL D. LAWSON,
SAMUEL R. SIMON,
Attorneys.

ALVIN L. GOTTLIEB,
Deputy Assistant General Counsel,

JOANNE S. SISK,
CHARLES J. RAUBICHECK,
Attorneys,
Food and Drug Division,
Department of Health, Education and Welfare.

FEBRUARY 1975.

DOJ-1975-02